


# ***PR 2004/28 - Income tax: 2004 Tumut Softwood Project***

 This cover sheet is provided for information only. It does not form part of *PR 2004/28 - Income tax: 2004 Tumut Softwood Project*

 This document has changed over time. This is a consolidated version of the ruling which was published on *1 June 2005*



## Product Ruling

### Income tax: 2004 Tumut Softwood Project

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Contents	Para
What this Product Ruling is about	1
Date of effect	11
Withdrawal	13
Arrangement	14
Ruling	59
Explanation	73
Example	133
Detailed contents list	134

Potential participants may wish to refer to the ATO's Internet site at <http://www.ato.gov.au> or contact the ATO directly to confirm the currency of this Product Ruling or any other Product Ruling that the ATO has issued.

#### *Preamble*

*The number, subject heading, and the **What this Product Ruling is about** (including **Tax law(s)**, **Class of persons and Qualifications sections**), **Date of effect**, **Withdrawal**, **Arrangement and Ruling parts of this document** are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. Product Ruling PR 1999/95 explains Product Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

*[Note: This is a consolidated version of this document. Refer to the Tax Office Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]*

#### **No guarantee of commercial success**

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The Australian Taxation Office (ATO) **does not** sanction or guarantee this product. Further, we give no assurance that the product is commercially viable, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based.

Potential participants must form their own view about the commercial and financial viability of the product. This will involve a consideration of important issues such as whether projected returns are realistic, the 'track record' of the management, the level of fees in comparison to similar products, how the investment fits an existing portfolio, etc. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants by confirming that the tax benefits set out below in the **Ruling** part of this document are available, **provided that** the arrangement is carried out in accordance with the information we have been given, and have described below in the **Arrangement** part of this document.

If the arrangement is not carried out as described below, participants lose the protection of this Product Ruling. Potential participants may wish to seek assurances from the promoter that the arrangement will be carried out as described in this Product Ruling.

Potential participants should be aware that the ATO will be undertaking review activities to confirm the arrangement has been implemented as described below and to ensure that the participants in the arrangement include in their income tax returns income derived in those future years.

## **Terms of use of this Product Ruling**

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This Product Ruling has been given on the basis that the person(s) who applied for the Ruling, and their associates, will abide by strict terms of use. Any failure to comply with the terms of use may lead to the withdrawal of this Ruling.

## **What this Product Ruling is about**

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1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates. In this Ruling this arrangement is sometimes referred to as the '2004 Tumut Softwood Project' or simply as 'the Project'.

### **Tax law(s)**

2. The tax laws dealt with in this Ruling are:
- Section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
  - Section 8-1 of the ITAA 1997;
  - Section 17-5 of the ITAA 1997;
  - Division 27 of the ITAA 1997;
  - Division 35 of the ITAA 1997;
  - Division 328 of the ITAA 1997;
  - Section 82KL of the *Income Tax Assessment Act 1936* (ITAA 1936);
  - Section 82KZL of the ITAA 1936;
  - Sections 82KZME - 82KZMF of the ITAA 1936;
  - Section 82KZMG of the ITAA 1936; and
  - Part IVA of the ITAA 1936.

### **Goods and Services Tax**

3. All fees and expenditure referred to in this Ruling include the Goods and Services Tax (GST) where applicable. In order for an entity (referred to in this Ruling as a 'Grower') to be entitled to claim input tax credits for the GST included in its expenditure, it must be registered or required to be registered for GST and hold a valid tax invoice.

**Changes in the Law**

4. The Government is currently evaluating further changes to the tax system in response to the Ralph Review of Business Taxation and continuing business tax reform is expected to be implemented over a number of years. Although this Ruling deals with the laws enacted at the time it was issued, later amendments may impact on this Ruling. Any such changes will take precedence over the application of this Ruling and, to that extent, this Ruling will be superseded.

5. Taxpayers who are considering participating in the Project are advised to confirm with their taxation adviser that changes in the law have not affected this Product Ruling since it was issued.

**Note to promoters and advisers**

6. Product Rulings were introduced for the purpose of providing certainty about tax consequences for participants in projects such as this. In keeping with that intention the Tax Office suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Ruling is issued.

**Class of persons**

7. The class of persons to whom this Ruling applies is the persons more specifically identified in the Ruling part of this Product Ruling and who enter into the arrangement specified below on or after the date this Ruling is made. They will have a purpose of staying in the arrangement until it is completed (i.e. being a party to the relevant agreements until their term expires), and deriving assessable income from this involvement as set out in the description of the arrangement. In this Ruling, these persons are referred to as 'Growers'.

8. The class of persons to whom this Ruling applies does not include persons who intend to terminate their involvement in the arrangement prior to its completion, or who otherwise do not intend to derive assessable income from it. Growers who elect to market their own produce (Non-Pooled Growers) are also excluded from the class of persons to whom this Ruling applies.

**Qualifications**

9. The Commissioner rules on the precise arrangement identified in the Ruling. If the arrangement described in the Ruling is materially different from the arrangement that is actually carried out, the Ruling has no binding effect on the Commissioner. The Ruling will be withdrawn or modified.

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## Date of effect

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11. This Ruling applies prospectively from 17 March 2004, the date this Ruling is made. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

12. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on the private ruling if the income year to which the private ruling relates has ended, or has commenced but not yet ended. However, if the arrangement covered by the private ruling has not commenced and the income year to which it relates has not yet commenced, this Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

Note: The Addendum to this Ruling that issued on 1 June 2005 applies on and from 1 June 2005.

## Withdrawal

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13. This Product Ruling is withdrawn and ceases to have effect after 30 June 2007. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all persons within the specified class who enter into the arrangement specified below. Thus, the Ruling continues to apply to those persons, even following its withdrawal, who entered into the specified arrangement prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

## Arrangement

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14. The arrangement that is the subject of this Ruling is specified below. This arrangement incorporates the following documents:

- Application for a Product Ruling dated 17 December 2003 as constituted by documents provided on 21 January 2004, 28 January 2004 and 18 February 2004 and additional correspondence dated 24 December 2003, 20 January 2004, 22 January 2004, 12 January 2004 and 17 February 2004;
- Draft Product Disclosure Statement ('PDS'), received 17 December 2003 and amendments received 18 February 2004;
- Draft **Constitution Australian Forestry Management 2004 Plantation Investment** dated 26 November 2003, received on 17 December 2003;
- The Draft Compliance Plan of the Australian Forestry Management 2004 Plantation Investment dated 9 December 2003, received on 17 December 2003;
- Draft **Forestry Management Agreement** between Heathley Asset Management Limited ('Heathley'), Australian Forestry Management Pty Limited ('AFM') and the Grower dated 8 December 2003 received on 17 December 2003 and amended agreement received 18 February 2004;
- Draft Management Agreement between AFM and Forestry Commission of New South Wales ('NSW State Forest Agreement') dated 9 October 2003, received 17 December 2003.
- Draft Constitution for Australian Forestry Management 2004 Land Trust dated 26 November 2003, received 17 December 2003;
- Draft Compliance Plan for Australian Forestry Management 2004 Land Trust, dated 26 November 2003, received 17 December 2003;
- Draft Forestry Right Agreement between Arrow Capital Pty Limited (Landowner), Heathley (responsible entity) and the Grower undated, received 17 December 2003;

- Draft Finance Package from Arrow Funding Pty Limited ('Arrow Funding') which includes the **Loan Application Form** and Loan Explanation and Loan Terms, dated 9 December 2003, received on 17 December 2003; and
- Finance Package details from the Major Australian Bank containing Investment Loan and Security Deed and letter dated 24 November 2003 from the Major Australian Bank to Heathley, received on 17 December 2003.

**Note:** certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

15. The documents highlighted are those that Growers may enter into. For the purposes of describing the arrangement to which this Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate of a Grower, will be a party to, which are a part of the arrangement. The effect of these agreements is summarised below.

16. All Australian Securities and Investment Commission (ASIC) requirements are, or will be, complied with for the term of the agreements.

### Overview

17. The salient features of the 2004 Tumut Softwood Project are as follows:

Location	Tumut/Tumbarumba Region of NSW
Type of business to be carried on by each participant	Commercial growing and cultivation of <i>Pinus Radiata</i> trees for the purpose of harvesting and selling the timber.
Number of hectares offered for cultivation	500 – 3,500 hectares
Size of each Forestry Right Interest (FRI)	1 hectare
Minimum allocation	5 FRI
Minimum subscription	500 FRI
Number of trees per FRI	1,000

Term of the Project	26 Years
Sinking Fund per FRI	\$370
Initial cost per FRI	\$10,780
Ongoing costs per FRI	Management fee payable from first thinnings \$1,100 plus CPI adjustment. (Year 13) Additional Sinking Fund Contribution \$450 (Year 13) Final Management fee of \$2,739 plus CPI adjustment. (Year 26) Rent calculated at 9.5% of net harvest proceeds. (Year 26)
<b>Land Trust Investment (optional)</b>	
Minimum Allocation	5 units
Minimum subscription	500 units
Cost per unit	\$500
Minimum Cost	\$2,500
Term	Approximately 26 years
Ongoing costs	NIL

18. Under the PDS applicants are invited to participate in the 2004 Tumut Softwood – Retail Project. Growers joining the Project will enter into a Forestry Management Agreement with AFM as the Manager and Heathley as the Responsible Entity. Heathley operates in its role as a responsible entity under its Australian Financial Services Licence number 246368.

19. At the same time Growers will enter into a Forestry Right Agreement ('FRA') with Arrow Capital Pty Ltd as Landowner and Heathley. Under the FRA Growers will be allocated a specific parcel of land which is evidenced by holding the legal title to a Forestry Right Interest ('FRI'). The FRI is similar to a lease and entitles the Growers to produce from the land.

20. AFM will enter into a contract with the Forestry Commission of New South Wales ('NSW State Forests') to provide the silvicultural services over the life of the Project. NSW State Forests will be responsible for identifying suitable land, land preparation, planting, forest maintenance and harvesting.

21. There will be a maximum of 3500 FRIs on offer, each equivalent to 1 plantable hectare. The initial cost per FRI is \$10,780

with Growers being required to subscribe to a minimum of 5 FRI. The Project will not proceed until a minimum of 500 FRIs have been achieved. There will be 1000 trees per FRI planted within 12 months of execution of the Forestry Management Agreement. There is a guaranteed survival rate of an average of 850 trees per FRI across the plantation for the first two years after planting.

22. The offer closes on 25 June 2004 and allotment date is 29 June 2004 or at the discretion of the Responsible Entity.

23. As well as entering a Forestry Investment Growers may choose to participate in an Investment in a Land Trust which will be established to be the ultimate owner of the plantation land. Growers may subscribe to units in the Land Trust at a cost of \$500 per unit. A Grower may subscribe to a minimum of 5 units. It will not be compulsory for a Grower to subscribe to the Land Trust.

### **Forestry Management Agreement**

24. The Grower engages AFM to act as an independent contractor to perform forestry services in respect of the FRI. Growers are required to pay \$10,780 per FRI (\$53,900 per minimum investment) for Initial Establishment Services.

25. Initial Establishment Services are all seasonally dependent agronomic activities to be conducted prior to June 2005. Services include:

- Site preparation within the approved Code of Practice, comprising, ripping & mounding cultivation, where appropriate, control of competing vegetation and control of noxious weeds and animals;
- Provision of cuttings or seedlings equivalent to GF23+ wherever growing conditions are suitable and GF19+ otherwise, as per the Planting Program for each Plantation. Density of planting is to be consistent with the desired silvicultural outcome (usually 1,000 stems per hectare);
- Planting GF23+ equivalent or such lower quality stock approved by the Manager cuttings or seedlings in accordance with the Planting Program; and
- Application of fertiliser if considered necessary by the Manager, including the application of boron.

26. The Manager is appointed to market and deal with the timber produce at each thinning and final harvest. Ongoing forestry services will be performed at all times prior to final harvest:

- managing and maintaining the Plantation;

- hazard reduction activities;
- quality control and internal audit of operations;
- assessments and reports on growth and performance as necessary;
- inventory assessments targeted at ages 1 or 2 years, at age 5 years where necessary, age 10 years and harvest;
- maintenance of roads, firebreaks, gates and related infrastructure and fences;
- identification of fire prevention and risk reduction parameters;
- maintenance and repair of roads; and
- rehabilitation of plantation land after final harvest.

27. Clause 6.6.1 provides Growers with the option to harvest and market their own timber (Non-Pooled Growers). Growers wishing to do so must notify the Manager in writing prior to entering into the Forestry Management Agreement but within the period specified by the Manager. The PDS specifies that a Grower must make an election by the allotment date, i.e. 29 June 2004. **This ruling does not apply to Non-Pooled Growers.**

28. Under clause 6.7 Pooled Growers are considered to have appointed the Manager to act as their agent to market the plantation produce. They authorise the Manager to consolidate and mix the plantation produce of their FRI with that of other pooled growers.

29. A Pooled Grower's share of produce will be calculated by reference to the size of the Grower's Forestry Right Land compared to the overall size of the Plantation Land of all Pooled Growers, except where the grower is an Affected Grower.

30. An Affected Grower is defined to be a Pooled Grower, who in the reasonable opinion of the Manager, has suffered a loss of Plantation Produce on their Forestry Right Land (clause 23.1).

31. Affected Grower's will have their share of pooled produce reduced by the pro rata amount of plantation produce lost or destroyed from their Forestry Right Land. (Clauses 5.4 & 6.7.4)

32. Plantation insurance is compulsory for all Pooled Growers. The Manager will seek to arrange insurance on an annual basis on a commercial standard industry basis (clause 10.1). The cost of insurance will be met from the Sinking Fund.

33. Where the Manager makes a claim under an insurance policy for Pooled Growers the proceeds received from the claim will be distributed to the Affected Growers within 30 days of receipt by the Manager (clause 10.3).

## **Sinking Fund**

34. AFM will establish and maintain a Sinking Fund under the Management Agreement (clause 8.5). The Sinking Fund will be used to pay the rates and taxes in respect of the Forestry Right land and insurance for Pooled Growers.
35. Pooled Growers are required to contribute \$370 and Non Pooled Growers contribute \$110 per FRI to the sinking fund. The initial Sinking Fund contribution will be made at the time of application.
36. At the time of First Thinnings Pooled Growers will be required to pay an additional contribution of \$450 per FRI to the sinking fund. There is no additional contribution for Non-Pooled Growers.
37. AFM may require additional contributions to the Sinking Fund if the total amount in the Sinking Fund is insufficient to cover the liabilities in respect of the plantation land (clause 8.8).

## **Forestry Right Agreement ('FRA')**

38. An interest in the land is provided to Growers via the FRA between the Landowner, the Responsible Entity and the Grower. The provisions of the agreement are incidental to the Forestry Right ('FR') with the intent that all the provisions are forestry covenants within the meaning of section 87A of the *Conveyancing Act 1919 (NSW)*. (clause 1.1)
39. The Landowner grants the FR for the consideration of \$1 which is payable out of the Sinking Fund (clause 3.1). The Landowner is entitled to a one off licence fee. For Pooled Growers the fee is equal to 10.45% of the harvest proceeds to which the Grower is entitled from the Final Harvest (clause 3.2)
40. The FRA grants the Grower the right to maintain, manage and harvest a crop of trees on the Forestry Right land. The Grower may also construct roads, tracks, bridges and other facilities on the land with the written consent of the Landowner (clause 5). The FR gives the Grower ownership of all trees on their Forestry Right land and all plantation produce from the land (clause 4).
41. The Grower is responsible for paying all rates, taxes and other charges on the Forestry Right land (clause 6.2). These costs will be paid out of the sinking fund.
42. The Landowner must not do anything on the Forestry Right land or on the adjacent land which would materially or adversely affect the Plantation (clause 7.8).

**State Forest Management Agreement**

43. AFM will subcontract with NSW State Forests to provide the silvicultural services for the life of the Project (clause 3.1) and to act as marketing agent for the Project (clause 10.1).

44. AFM acknowledges that NSW State Forests is not entering into an exclusive arrangement. NSW State Forests intends to enter into agreements and arrangements with others in relation to the establishment and maintenance of forests (clause 3.2).

45. Schedule 1 details the Forestry Services to be provided by NSW State Forests under the agreement. Part 6 and Schedule 2 specify the management fee payable to NSW State Forests for the provision of services. An initial management fee is payable at the time the Project is established. A Final Management fee will be payable after the final harvest.

**Constitution Australian Forestry Management 2004 Plantation Investment**

46. The Constitution establishes the Project and operates as a deed binding on all of the Project's Growers and the Responsible Entity (clause 1.3). The Constitution sets out the terms and conditions under which Heathley agrees to act as Responsible Entity. Growers are bound by the Constitution by virtue of their participation in the Project. The Responsible Entity will keep a register of Growers (clause 17).

47. Under the terms of the Constitution, all moneys received from applications shall be paid to Heathley for deposit into a bank account operated by it. Heathley holds the Application Money received in its own name on behalf of the Growers (clause 8.4.1). The application moneys will be released by Heathley when it is reasonably satisfied that the minimum subscription has been attained and each Forestry Right Agreement and Management Agreement has been properly executed (clause 4.1).

48. In summary, the Constitution also sets out provisions relating to:

- applications to be on the form attached to the PDS (clause 2.1);
- appointment of Heathley as the Grower's irrevocable agent, representative and attorney (clause 3.6);
- procedures relating to Applications (clause 2);
- the discretion of Heathley to refuse an Application (clause 3.1);

- the effect of an Applicant's Application being accepted by Heathley (clause 3.5);
- preparation and execution of the Forestry Right Agreement and Management Agreement by Heathley (clause 3.5.1);
- establishment and maintenance of a Register of Growers (clause 17);
- Heathley's duties, powers and obligations (clause 10);
- the right of Heathley to be paid certain expenses (clause 23);
- resolution of complaints made by the Grower in relation to the Scheme or Heathley (clause 27); and
- termination of the Scheme (clause 25).

## **Compliance Plan Australian Forestry Management 2004 Plantation Investment**

49. As required by the *Corporations Act 2001*, Heathley has prepared a Compliance Plan. The purpose of the Compliance Plan is to ensure that Heathley manages the Scheme in accordance with its obligations and responsibilities contained in the Constitution and that the interests of Growers are protected.

## **Constitution Australian Forestry Management 2004 Land Trust**

50. The Land Trust is a unit trust that will be a registered managed investment scheme under Chapter 5C of the *Corporations Act 2001*. Heathley will act as the trustee for the Land Trust.

51. The Land Trust will acquire from Arrow Capital Pty Limited the land on which the Project will be carried out.

## **Compliance Plan Australian Forestry Management 2004 Land Trust**

52. As required by the *Corporations Act 2001*, Heathley has prepared a Compliance Plan. The purpose of the Compliance Plan is to ensure that Heathley manages the Scheme in accordance with its obligations and responsibilities contained in the Constitution and that the interests of Growers are protected.

**Fees**

53. The following fees, **per FRI**, are set out in the Management Agreement and Forestry Right Agreement:

- \$10,780 for 'Initial Establishment Services' to be provided in the year ended 30 June 2005, payable on application;
- \$370 contribution to the Sinking Fund to cover the future costs of rates, taxes and insurance, payable on application;
- \$450 contribution to the Sinking Fund from First Thinnings, payable approximately year 13;
- The lesser of \$1,100 plus CPI adjustment or balance of proceeds from First Thinnings after paying Sinking Fund contribution for 'Interim Management Fee', payable approximately year 13;
- \$2,739 plus CPI adjustment Final Management Fee from Final Harvest, payable approximately year 26; and
- Rent on Forestry Right land equal to 10.45% of Harvest Proceeds.

**Finance**

54. Growers can fund their involvement in the Project by borrowing from Arrow Funding (a lender associated with the Manager) or from a Major Australian Bank (a facility arranged by the Responsible Entity) or borrow from an independent lender. Any finance associated with the Manager or the Responsible Entity will be on a full recourse basis and arm's length commercial terms.

55. Details of the loans that will be offered to Growers by Arrow Funding are set out in the 'Finance Facility (Australian Forestry Management 2004 Tumut Softwood Project)' document. The document is summarised as follows:

- Arrow Funding will lend up to 100% of the Grower's application amount;
- Arrow Funding will pay stamp duty and registration fees in relation to the document;
- the 'Loan Term' is for a period of 7 years. The interest rate will be reset annually on the 'Interest Reset Date' of 1 June each year;

- the loan is repayable over the Loan Term as interest only for the first three years and then interest plus 25% of the principal for the remaining four years. Interest is payable in arrears. Payments are due on 1 June each year;
- interest will be charged on the outstanding balance calculated daily;
- Arrow Funding will obtain security for the finance facility by a mortgage over the Grower's FRI's and/or units in the Land Trust;
- where the Grower is a corporate borrower, unless otherwise advised by Arrow Funding, the directors of the entity will be required to personally guarantee the finance facility; and
- the Grower is entitled to repay the whole or any part of the principal sum on 1 June of any year prior to the Repayment Date.

55A. Growers may elect to vary the term of the loan as follows:

- the 'Loan Term' is for a period of 10 years;
- the loan is repayable over the Loan Term as interest only for the first five years, then interest plus 20% of the principal in each of the remaining five years; and
- the interest rate for the loan will be fixed at 8.25% from 1 June 2005 to 1 June 2009. From 1 June 2009, until the repayment of the loan, interest will apply at a margin of 2.35% over the five year bank bill rate.

All other terms of the loan remain unchanged.

56. The finance made available by the Major Australian Bank is offered on the following terms which are contained in the Investment Loan and Security Deed and letter dated 24 November 2003 from the Major Australian Bank to Heathley:

- Maximum amount allowed to be borrowed is \$275,000 or 100% of the Grower's application amount in respect of FRI's and/or Units in the Land Trust plus the Establishment Fee, whichever is the lesser;
- The term of the loan will be 10 years with loan repayments made monthly in arrears. The terms of repayment of the loan can be either:
  - 3 years interest only followed by 7 years principal and interest (Option 1); or

- 10 years principal and interest (Option 2).
- The interest rate payable for the loan is initially set at 3% above the Major Australian Bank's transfer pricing rate.
  - Where a Grower adopts repayment terms under Option 1 the interest rate will be reviewed after the 3 year interest only period and again after 5 years of the subsequent principal and interest repayment period.
  - Where a Grower adopts repayment terms under Option 2 the interest rate will be reviewed after 5 years.
- Interest will be charged on the outstanding balance calculated daily;
- The Major Australian Bank will obtain security for the loan by way of a lien/charge over the Grower's FRI's and/or Units in the Land Trust and interest in the Forestry Management Agreement; and
- Where the Grower is a corporate borrower, the directors of the company will be required to personally guarantee and indemnify the loan unless otherwise advised.

57. Growers cannot rely on this Product Ruling if they enter into a finance agreement with Arrow Funding or the Major Australian Bank that materially differs from that set out in the information provided to the Tax Office with the application for this Product Ruling or if application monies otherwise remain unpaid by 30 June 2004.

58. This Ruling does not apply if the finance arrangement entered into by the Grower includes or has any of the following features:

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;
- 'additional benefits' are or will be granted to the borrowers for the purpose of section 82KL or the funding arrangements transform the Project into a 'scheme' to which Part IVA may apply;
- the loan or rate of interest is non-arm's length;
- repayments of the principal and payments of interest are linked to the derivation of income from the Project;

- the funds borrowed, or any part of them, will not be available for the conduct of the Project but will be transferred (by any mechanism, directly or indirectly) back to the lender or any associate of the lender;
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or
- entities associated with the Project, other than Arrow Funding are involved or become involved in the provision of finance to Growers for the Project.

## Ruling

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### Application of this Ruling

59. This Ruling applies only to Growers who are accepted to participate in the Project on or before 29 June 2004, who have executed a Management Agreement and a FRA on or before that date and are Pooled Growers. The Grower's participation in the Project must constitute the carrying on of a business of primary production.

### Minimum subscription

60. A Grower is not eligible to claim any tax deductions until the Grower's application to enter the Project is accepted and the Project has commenced. Under the terms of the PDS, a Grower's application will not be accepted and the Project will not proceed until the minimum subscription of 500 FRIs is achieved.

### The Simplified Tax System ('STS')

#### *Division 328*

61. For a Grower participating in the Project, the recognition of income and the timing of tax deductions is different depending on whether the Grower is an 'STS taxpayer'. To be an 'STS taxpayer' a Grower:

- must be eligible to be an 'STS taxpayer'; and
- must have elected to be an 'STS taxpayer'.

### Qualification

62. This Product Ruling assumes that a Grower who is an 'STS taxpayer' is so for the income year in which their participation in the

Project commences. A Grower may become an 'STS taxpayer' at a later point in time. Also, a Grower who is an 'STS taxpayer' may choose to stop being an 'STS taxpayer', or may cease to be eligible to be an 'STS taxpayer', during the term of the Project. These are contingencies relating to the circumstances of individual Growers that cannot be accommodated in this Ruling. Such Growers can ask for a private ruling on how the taxation legislation applies to them.

### **Assessable Income**

#### ***Section 6-5 and section 328-105***

63. That part of the gross sales proceeds from the Project attributable to the Grower's produce, less any GST payable on those proceeds (section 17-5), will be assessable income of the Grower under section 6-5.

64. The Grower who is not an 'STS taxpayer' recognises ordinary income from carrying on the business of afforestation at the time that income is derived.

65. The Grower who is an 'STS taxpayer' recognises ordinary income from carrying on the business of afforestation at the time that income is received (paragraph 328-105(1)(a)).

### **Deductions for Initial Establishment Services and Interest**

#### ***Section 8-1 and section 328-105***

66. A Grower may claim tax deductions per FRI under section 8-1 of the ITAA 1997, for the revenue expenses in the Table below.

67. However, if for any reason, an amount shown or referred to in the Table below is not fully paid in the year in which it is incurred by a Grower who is an 'STS taxpayer' then the amount is only deductible to the extent to which it has been paid, or has been paid for the Grower. Any amount or part of an amount shown in the Table below which is not paid in the year in which it is incurred will be deductible in the year in which it is actually paid.

**PR 2004/28**

<b>Fee Type</b>	<b>Year ended 30 June 2004</b>	<b>Year ended 30 June 2005</b>	<b>Year ended 30 June 2006</b>
<b>Initial Establishment Services</b>	\$10,780 See Notes (i) & (ii)		
<b>Interest</b>	As incurred <b>(Non-STS taxpayers)</b> Or as paid <b>(STS taxpayers)</b> See Note (iii)	As incurred <b>(Non-STS taxpayers)</b> Or as paid <b>(STS taxpayers)</b> See Note (iii)	As incurred <b>(Non-STS taxpayers)</b> Or as paid <b>(STS taxpayers)</b> See Note (iii)

**Notes:**

- (i) If the Grower is registered or required to be registered for GST, amounts of outgoing would need to be adjusted as relevant for GST (e.g. input tax credits): Division 27. See Example 1 at paragraph 133.
- (ii) The Initial Establishment Services is expenditure for 'seasonally dependent agronomic activities' (see paragraphs 99 to 103) and is deductible in the income year in which it is incurred (where the Grower is **not an 'STS taxpayer'**) or the year in which it is paid (where the Grower is an **'STS taxpayer'**).
- (iii) The deductibility or otherwise of interest arising from loan agreements entered into with financiers other than Arrow Funding, the internal financier, or the Major Australian Bank is outside the scope of this Ruling. However all Growers, including those who finance their participation in the Project other than with Arrow Funding or the Major Australian Bank, should read the discussion of the prepayment rules in paragraphs 91 to 98 (below) as those rules may be applicable if interest is prepaid. Subject to the 'excluded expenditure' exception, the prepayment rules apply whether the prepayment is required under the relevant loan agreement or is at the Grower's choice.

**Division 35 - Deferral of losses from non-commercial business activities****Section 35-55 – Commissioner's discretion**

68. For a Grower who is an individual and who enters the Project during the year ended 30 June 2004 the rule in section 35-10 may

apply to the business activity comprised by their involvement in this Project. Under paragraph 35-55(1)(b) the Commissioner will decide for the income years ending 30 June 2004 to 30 June 2029 that the rule in section 35-10 does not apply to this activity provided that the Project is carried out in the manner described in this Ruling.

69. This exercise of the discretion in subsection 35-55(1) will not be required where, for any year in question:

- the 'exception' in subsection 35-10(4) applies (see paragraph 120 in the Explanation part of this ruling, below); or
- a Grower's business activity satisfies one of the tests in sections 35-30, 35-35, 35-40 or 35-45; or
- a Grower's business activity produces assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsection 35-10(2)).

70. Where, the 'exception' in subsection 35-10(4) applies, the Grower's business activity satisfies one of the tests, or the discretion in subsection 35-55(1) is exercised, section 35-10 will not apply. This means that a Grower will not be required to defer any excess of deductions attributable to their business activity in excess of any assessable income from that activity, i.e. any 'loss' from that activity, to a later year. Instead, this 'loss' can be offset against other assessable income for the year in which it arises.

71. Growers are reminded of the important statement made on Page 1 of this Product Ruling. Therefore, Growers should not see the Commissioner's decision to exercise the discretion in paragraph 35-55(1) as an indication that the Tax Office sanctions or guarantees the Project or the product to be commercially viable. An assessment of the Project or the product from this perspective has not been made.

### **Section 82KL and Part IVA**

72. For a Grower who participates in the Project and incurs expenditure as required by the Management Agreement and the FRA the following provisions of the ITAA 1936 have application as indicated:

- section 82KL does not apply to deny the deductions otherwise allowable; and
- the relevant provisions in Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

## **Explanation**

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### **Is the Grower carrying on a business?**

73. For the amounts set out in the Table above to constitute allowable deductions the Grower's afforestation activities as a participant in the 2004 Tumut Softwood Project must amount to the carrying on of a business of primary production.

74. Where there is a business, or a future business, the gross proceeds from the sale of the wood produce will constitute gross assessable income in their own right. The generation of 'business income' from such a business, or future business, provides the backdrop against which to judge whether the outgoings in question have the requisite connection with the operations that more directly gain or produce this income.

75. For schemes such as the 2004 Tumut Softwood Project, Taxation Ruling TR 2000/8 sets out in paragraph 89 the circumstances in which the Grower's activities can constitute the carrying on of a business. As Taxation Ruling TR 2000/8 sets out, these circumstances have been established in court decisions such as *Commissioner of Taxation v. Lau* (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55.

76. Generally, a Grower will be carrying on a business of afforestation, and hence primary production, if:

- the Grower has an identifiable interest (by lease or by licence) in the land on which the Grower's trees are established;
- the Grower has a right to harvest and sell the wood produce from those trees;
- the afforestation activities are carried out on the Grower's behalf;
- the afforestation activities of the Grower are typical of those associated with a afforestation business; and
- the weight and influence of general indicators point to the carrying on of a business.

77. In this Project, each Grower enters into a Management Agreement and a FRA.

78. Under the FRA each individual Grower will have rights over a specific and identifiable area of land. The FRA provides the Grower with an ongoing interest in the specific trees on the Forestry Right Land area for the term of the Project. Under the FRA the Grower must use the land in question for the purpose of carrying out afforestation activities, and for no other purpose. The FRA allows AFM, as

Manager, to come onto to the land to carry out its obligations under the Management Agreement.

79. Under the Management Agreement AFM is engaged to provide Forestry Services on the Grower's Forestry Right Land during the term of the Project. Under the NSW State Forests Agreement AFM subcontracts the Forestry Services to NSW State Forests which holds the appropriate professional skills and credentials to provide the services to establish and maintain the afforestation activities on the Grower's behalf during the 'Term' of the Project.

80. AFM is also engaged to harvest and sell, on the Grower's behalf, the wood produce grown on the Grower's FRI. These services have also been subcontracted to NSW State Forests.

81. The general indicators of a business, as used by the Courts, are described in *Taxation Ruling* TR 97/11. Positive findings can be made from the Project's description for all the indicators.

82. The activities that will be regularly carried out during the term of the Project demonstrate a significant commercial purpose. Based on reasonable projections, a Grower in the Project will derive assessable income from the sale of the wood produce that will return a before-tax profit, i.e. a profit in cash terms that does not depend in its calculation on the fees in question being allowed as a deduction.

83. The pooling of wood produce from trees grown on the Grower's FRI with the wood produce of other Growers is consistent with general afforestation practices. Each Grower's proportionate share of the sale proceeds of the pooled wood products will reflect the proportion of the trees contributed from their FRI.

84. The AFM & NSW State Forests services are also consistent with general silvicultural practices. They are of the type ordinarily found in afforestation ventures that would commonly be said to be businesses. While the size of a FRI is relatively small, it is of a size and scale to allow it to be commercially viable.

85. The Grower's degree of control over AFM as evidenced by the Management Agreement, and supplemented by the *Corporations Act 2001*, is sufficient. During the term of the Project, the Manager will provide the Grower with regular progress reports on the Grower's FRI and the activities carried out on the Grower's behalf. Growers are able to terminate arrangements with the AFM in certain instances, such as cases of default or neglect.

86. The afforestation activities, and hence the fees associated with their procurement, are consistent with an intention to commence regular activities that have an 'air of permanence' about them. For the purposes of this Ruling, the Growers' afforestation activities in the 2004 Tumut Softwood Project will constitute the carrying on of a business.

## **The Simplified Tax System**

### ***Division 328***

87. Subdivision 328-F sets out the eligibility requirements that a Grower must satisfy in order to enter the STS and Subdivision 328-G sets out the rules for entering and leaving the STS.

88. The question of whether a Grower is eligible to be an 'STS taxpayer' is outside the scope of this Product Ruling. Therefore, any Grower who relies on those parts of this Ruling that refer to the STS will be assumed to have correctly determined whether or not they are eligible to be an 'STS taxpayer'.

## **Deductibility of management fees and lease fees**

### ***Section 8-1***

89. Consideration of whether fees for Initial Establishment Services are deductible under section 8-1 begins with the first limb of the section. This view proceeds on the following basis:

- the outgoing in question must have a sufficient connection with the operations or activities that directly gain or produce the taxpayer's assessable income;
- the outgoings are not deductible under the second limb if they are incurred when the business has not commenced; and
- where all that happens in a year of income is that a taxpayer is contractually committed to a venture that may not turn out to be a business, there can be doubt about whether the relevant business has commenced, and hence, whether the second limb applies. However, that does not preclude the application of the first limb in determining whether the outgoing in question has a sufficient connection with activities to produce assessable income.

90. The fees for Initial Establishment Services associated with the afforestation activities will relate to the gaining of income from the Grower's business of afforestation (see above), and hence have a sufficient connection to the operations by which income (from the harvesting and sale of wood produce) is to be gained from this business. They will thus be deductible under the first limb of section 8-1. Further, no 'non-income producing' purpose in incurring the fee is identifiable from the arrangement. The fee appears to be reasonable. There is no capital component of the fees for Initial Establishment

Services. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply.

### **Prepayment provisions**

#### ***Sections 82KZL to 82KZMG***

91. The prepayment provisions contained in Subdivision H of Division 3 of Part III of the ITAA 1936 affect the timing of deductions for certain prepaid expenditure. These provisions apply to certain expenditure incurred under an agreement in return for the doing of a thing under the agreement (e.g. the performance of management services or the leasing of land) that will not be wholly done within the same year of income as the year in which the expenditure is incurred. If expenditure is incurred to cover the provision of services to be provided within the same year, then it is not expenditure to which the prepayment rules apply.

92. For this Project, only section 82KZL (an interpretive provision) and sections 82KZME, 82KZMF and 82KZMG are relevant. Subject to section 82KZMG, if the requirements of sections 82KZME and 82KZMF are met, taxpayers determine deductions for prepaid expenditure under section 82KZMF using the formula in subsection 82KZMF(1). These provisions also apply to 'STS taxpayers' because there is no specific exclusion contained in section 82KZME that excludes them from the operation of section 82KZMF.

#### ***Sections 82KZME and 82KZMF***

93. Other than expenditure deductible under section 82KZMG, if the requirements of subsections 82KZME(2) and (3) are met, the formula in subsection 82KZMF(1) (see below) will apply to apportion expenditure that is otherwise deductible under section 8-1 of the ITAA 1997. The requirements of subsection 82KZME(2) will be met if expenditure is incurred by a taxpayer in return for the doing of a thing that is not to be wholly done within the year the expenditure is made. The year in which such expenditure is incurred is called the 'expenditure year' (subsection 82KZME(1)).

94. The requirements of subsection 82KZME(3) will be met where the agreement (or arrangement) has the following characteristics:

- the taxpayer's allowable deductions under the agreement for the 'expenditure year' exceed any assessable income attributable to the agreement for that year; and

- the taxpayer does not have effective day to day control over the operation of the agreement. That is, the significant aspects of the arrangement are managed by someone other than the taxpayer; and
- either :
  - a) there is more than one participant in the agreement in the same capacity as the taxpayer; or
  - b) the person who promotes, arranges or manages the agreement (or an associate of that person) promotes similar agreements for other taxpayers.

95. For the purpose of these provisions, the agreement includes all activities that relate to the agreement (subsection 82KZME(4)). This has particular relevance for a Grower in this Project who, in order to participate in the Project may borrow funds from a financier other than Arrow Funding. Although undertaken with an unrelated party, that financing would be an element of the arrangement. The funds borrowed and the resulting interest deduction are directly related to the activities under the arrangement. If a Grower prepays interest under such financing arrangements, the deductions allowable will be subject to apportionment under section 82KZMF.

96. There are a number of exceptions to these rules, but for Growers participating in this Project, only the 'excluded expenditure' exception in subsection 82KZME(7) is relevant. 'Excluded expenditure' is defined in subsection 82KZL(1). However, for the purposes of Growers in this Project, 'excluded expenditure' is prepaid expenditure incurred under the arrangement that is less than \$1,000. Such expenditure is immediately deductible.

97. Where the requirements of section 82KZME are met, section 82KZMF applies to apportion relevant prepaid expenditure. Section 82KZMF uses the formula below, to apportion prepaid expenditure and allow a deduction over the period that the benefits are provided.

$$\text{Expenditure} \times \frac{\text{Number of days of eligible service period in the year of income}}{\text{Total number of days of eligible service period}}$$

98. In the formula 'eligible service period' (defined in subsection 82KZL(1)) means, the period during which the thing under the agreement is to be done. The eligible service period begins on the day on which the thing under the agreement commences to be done or on the day on which the expenditure is incurred, whichever is the later, and ends on the last day on which the thing under the agreement ceases to be done, up to a maximum of 10 years.

***Section 82KZMG***

99. Under section 82KZMG(1), expenditure is excluded from the prepayment rules that would otherwise apply, to the extent that the prepaid amount satisfies the requirements of subsections 82KZMG(2) to (4).

100. Subsection 82KZMG(2) requires that the expenditure is

- incurred on or after 2 October 2001 and on or before 30 June 2006; and
- the eligible service period must be 12 months or shorter and must end on or before the last day of the year of income after the expenditure year; and
- for the doing of a thing under the agreement that is not to be wholly done within the expenditure year.

101. To satisfy subsection 82KZMG(3) the agreement must satisfy the following requirements:

- it must be an agreement for planting and tending trees for felling; and
- be an agreement where the taxpayer does not have day to day control over the operations arising out of the agreement. (a right to be consulted or to give directions does not equate to day to day control for the purposes of this requirement); and
- either:
  - (i) there is more than one participant in the agreement in the same capacity as the taxpayer; or
  - (ii) the Manager manages, arranges or promotes the agreement, or an associate of the Manager, manages, arranges or promotes similar agreements.

102. Under subsection 82KZMG(4) the expenditure incurred by the taxpayer must be paid for 'seasonally dependent agronomic activities' undertaken by the Manager during the 'establishment period' for the relevant planting of trees for felling.

103. Subsection 82KZMG(5) defines the 'establishment period to commence at the time that the first 'seasonally dependent agronomic activity' is performed in relation to a specific planting of trees and to conclude with the planting of trees. Where it is necessary to apply a fertiliser or herbicide to the trees at the same time as planting then those activities fall within the establishment period. Planting of trees refers to the main planting of the particular plantation and expressly

excludes specific planting to replace existing seedlings that have not survived.

*Application of the prepayment provisions to this Project*

104. Under the Management Agreement, for each FRI a Grower incurs a fee for Initial Establishment services in Year 1 consisting of expenditure of \$10,780 for 'seasonally dependent agronomic activities'.

105. As the requirements of section 82KZMG have been met, a deduction is allowable in the income year ended 30 June 2004 for the expenditure incurred under the Management Agreement for 'seasonally dependent agronomic activities'.

106. The Management Agreement also requires that a Grower incurs an Interim Management fee in approximately year 13 and Final Management Fee in year 26 for the performance of maintenance services during the term of the Project. Under the FRA a Grower incurs rent of 10.45% of Harvest Proceeds for each FRI to lease land during the term of the Project, payable at the time of Final Harvest.

107. The Interim and Final Management Fee incurred under the Management Agreement and the rent incurred under the FRA are not prepaid. These fees are charged for providing maintenance services and for the lease of the land to a Grower until 30 June of the year in which the fees are incurred.

108. On this basis, the basic precondition in subsection 82KZME(2) is not satisfied and, in these circumstances, section 82KZMF will have no application to the Management Fees in years 13 and 26 and the rent payable in year 26.

109. A Grower who is an 'STS taxpayer' can, therefore, claim an immediate deduction for each of the relevant fees in the income year in which the fee is paid. A Grower who is not an 'STS taxpayer' can claim an immediate deduction for each of the relevant fees in the income year in which the fee is incurred.

## **Interest deductibility**

### ***Section 8-1***

*(i) Growers who use Arrow Funding or the Major Australian Bank as the finance provider*

110. Some Growers may finance their participation in the Project through a loan facility with Arrow Funding or the Major Australian Bank. Whether the resulting interest costs are deductible under section 8-1 depends on the same reasoning as that applied to the deductibility of lease and management fees.

111. The interest incurred for the year ended 30 June 2004 and in subsequent years of income will be in respect of a loan to finance the Grower's business operations - the cultivation and growing trees and the lease (or licence) of the land on which the trees will have been planted - that will continue to be directly connected with the gaining of 'business income' from the Project. Such interest will, therefore, have a sufficient connection with the gaining of assessable income to be deductible under section 8-1.

112. As with the management fees and the rent, in the absence of any application of the prepayment provisions (see paragraphs 91 to 98), the timing of deductions for interest will again depend upon whether a Grower is an 'STS taxpayer' or is not an 'STS taxpayer'.

113. If the Grower is not an 'STS taxpayer', interest is deductible in the year in which it is incurred.

114. If the Grower is an 'STS taxpayer' interest is not deductible until it has been both incurred and paid, or is paid for the Grower. If interest that is properly incurred in an income year remains unpaid at the end of that income year, the unpaid amount is deductible in the income year in which it is actually paid, or is paid for the Grower.

*(ii) Growers who DO NOT use Arrow Funding or the Major Australian Bank as the finance provider*

115. The deductibility of interest incurred by Growers who finance their participation in the Project through a loan facility with a bank or financier other than Arrow Funding or the Major Australian Bank is outside the scope of this Ruling. Product Rulings only deal with arrangements where all details and documentation have been provided to, and examined by the Tax Office.

116. While the terms of any finance agreement entered into between relevant Growers and such financiers are subject to commercial negotiation, those agreements may require interest to be prepaid. Alternatively, a Grower may choose to prepay such interest. Unless such prepaid interest is 'excluded expenditure' any tax deduction that is allowable will be subject to the prepayment provisions of the ITAA 1936 (see paragraphs 91 to 98).

**Division 35 - Deferral of losses from non-commercial business activities**

117. Division 35 applies to losses from certain business activities for the income year ended 30 June 2001 and subsequent years. Under the rule in subsection 35-10(2) a deduction for a loss made by an individual (including an individual in a general law partnership) from

certain business activities will not be taken into account in an income year unless:

- the exception in subsection 35-10(4) applies;
- one of four tests in sections 35-30, 35-35, 35-40 or 35-45 is satisfied; and
- if one of the tests is not satisfied, the Commissioner exercises the discretion in section 35-55.

118. Generally, a loss in this context is, for the income year in question, the excess of an individual taxpayer's allowable deductions attributable to the business activity over that taxpayer's assessable income from the business activity.

119. Losses that cannot be taken into account in a particular year of income, because of subsection 35-10(2), can be applied to the extent of future profits from the business activity, or are deferred until one of the tests is satisfied, the discretion is exercised, or the exception applies.

120. For the purposes of applying Division 35, subsection 35-10(3) allows taxpayers to group business activities 'of a similar kind'. Under subsection 35-10(4), there is an 'exception' to the general rule in subsection 35-10(2) where the loss is from a primary production business activity and the individual taxpayer has other assessable income for the income year from sources not related to that activity, of less than \$40,000 (excluding any net capital gain). As both subsections relate to the individual circumstances of Growers who participate in the Project they are beyond the scope of this Product Ruling and are not considered further.

121. In broad terms, the tests require:

- (a) at least \$20,000 of assessable income in that year from the business activity (section 35-30);
- (b) the business activity results in a taxation profit in 3 of the past 5 income years (including the current year)(section 35-35);
- (c) at least \$500,000 of real property, or an interest in real property, (excluding any private dwelling) is used on a continuing basis in carrying on the business activity in that year (section 35-40); or
- (d) at least \$100,000 of certain other assets (excluding cars, motor cycles and similar vehicles) are used on a continuing basis in carrying on the business activity in that year (section 35-45).

122. A Grower who participates in the Project will be carrying on a business activity that is subject to these provisions. Information

provided with the application for this Product Ruling indicates that a Grower who acquires the minimum allocation of 5 FRIs in the Project is unlikely to have their activity satisfy one of the tests until Final Harvest in 2030. Growers who acquire more than one interest in the Project may however, find that their activity satisfies one of the tests in an earlier income year.

123. Unless the Commissioner exercises an arm of the discretion under paragraphs 35-55(1)(a) or (b), the rule in subsection 35-10(2) will apply to defer to a future income year any loss that arises from the Grower's participation in the Project.

124. The first arm of the discretion in paragraph 35-55(1)(a) relates to 'special circumstances' applicable to the business activity, and has no relevance for the purposes of this Product Ruling. However, the second arm of the discretion in paragraph 35-55(1)(b) may be exercised by the Commissioner where the business activity has started to be carried on and for that, or those income years;

- because of its nature, the business activity has not satisfied, or will not satisfy one of the tests set out in Division 35; and
- there is an expectation that the business activity of an individual taxpayer will either satisfy one of the tests or produce a taxation profit within a period that is commercially viable for the industry concerned.

125. Information provided with this Product Ruling indicates that a Grower who acquires the minimum investment of 5 FRIs in the Project is expected to be carrying on a business activity that will satisfy one of the tests in the income year ended 30 June 2030, or will produce a taxation profit, for the income year ended 30 June 2017.

126. The Commissioner will decide for such a Grower that it would be reasonable to exercise the second arm of the discretion for all income years up to, and including the income year ended 30 June 2029. The taxation profit that is projected for the income year ended 30 June 2017 does not affect the period of the Commissioner's discretion as it is considered to be a 'one-off' event that is specific to the afforestation industry.

127. This Product Ruling is issued on a prospective basis (i.e. before an individual Grower's business activity starts to be carried on). The Project, however, may fail to be carried on during the income years specified above (see paragraph 68), in the manner described in the Arrangement (see paragraphs 14 to 58). If so, this Ruling, and specifically the decision in relation to paragraph 35-55(1), that it would be unreasonable that the loss deferral rule in subsection 35-10(2) not apply, may be affected, because the Ruling no longer applies (see paragraph 9). Growers may need to apply for private

rulings on how paragraph 35-55(1) will apply in such changed circumstances.

128. In deciding that the second arm of the discretion in paragraph 35-55(1)(b) will be exercised on this conditional basis, the Commissioner has relied upon:

- the report of the independent forester and additional expert or scientific evidence provided with the application by the Manager;
- independent, objective and generally available information relating to the plantation timber industry which substantially supports cash flow projections and other claims, including prices and costs, in the Product Ruling application submitted by the Manager.

## **Section 82KL – recouped expenditure**

129. The operation of section 82KL depends, among other things, on the identification of a certain quantum of ‘additional benefits(s)’. Insufficient ‘additional benefits’ will be provided to trigger the application of section 82KL. It will not apply to deny the deduction otherwise allowable under section 8-1.

## **Part IVA – general tax avoidance provisions**

130. For Part IVA to apply there must be a ‘scheme’ (section 177A), a ‘tax benefit’ (section 177C) and a dominant purpose of entering into the scheme to obtain a tax benefit (section 177D).

131. The 2004 Tumut Softwood – Retail Project will be a ‘scheme’. A Grower will obtain a ‘tax benefit’ from entering into the scheme, in the form of tax deductions for the amounts detailed at paragraphs 66 to 67 that would not have been obtained but for the scheme. However, it is not possible to conclude the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

132. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the harvesting and sale of the wood produce. There are no facts that would suggest that Growers have the opportunity of obtaining a tax advantage other than the tax advantages identified in this Ruling. There is no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing at arm’s length or, if any parties are not dealing at arm’s length, that any adverse tax consequences result. Further, having regard to the factors to be considered under paragraph 177D(b) it cannot be concluded, on the

information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

## **Example**

### **Entitlement to GST input tax credits**

133. Susan, who is a sole trader and registered for GST, contracts with a manager to manage her forestry business. Her manager is registered for GST and charges her a management fee payable every six months in advance. On 1 December 2003, Susan receives a valid tax invoice from her manager requesting payment of a management fee in advance, and also requesting payment for an improvement in the connection of electricity for her plantation that she contracted him to carry out. The tax invoice includes the following details:

Management fee for period 1/1/2004 to 30/6/2004	\$4,400*
Carrying out of upgrade of power for your plantation as quoted	<u>\$2,200*</u>
Total due and payable by 1 January 2004 (includes GST of \$600)	<u>\$6,600</u>

\*Taxable supply

Susan pays the invoice by the due date and calculates her input tax credit on the management fee (to be claimed through her Business Activity Statement) as:

$$\frac{1}{11} \times \$4,400 = \$400.$$

Hence her outgoing for the management fee is effectively \$4,400 *less* \$400, or \$4,000.

Similarly, Susan calculates her input tax credit on the connection of electricity as:

$$\frac{1}{11} \times \$2,200 = \$200.$$

Hence her outgoing for the power upgrade is effectively \$2,200 *less* \$200, or \$2,000.

In preparing her income tax return for the year ended 30 June 2004, Susan is aware that the management fee is deductible in the year incurred. She calculates her management fee deduction as \$4,000 (not \$4,400).

Susan is aware that the electricity upgrade is deductible 10% per year over a 10 year period. She calculates her deduction for the power upgrade as \$200 (one tenth of \$2,000 only, not one tenth of \$2,200).

**Detailed contents list**

134. Below is a detailed contents list for this Product Ruling:

	<b>Paragraph</b>
<b>What this Product Ruling is about</b>	<b>1</b>
Tax law(s)	2
Goods and Services Tax	3
Changes in the Law	4
Note to promoters and advisers	6
Class of persons	7
Qualifications	9
<b>Date of effect</b>	<b>11</b>
<b>Withdrawal</b>	<b>13</b>
<b>Arrangement</b>	<b>14</b>
Overview	17
Forestry Management Agreement	24
Sinking Fund	34
Forestry Right Agreement ('FRA')	38
State Forests Management Agreement	43
Constitution Australian Forestry Management 2004 Plantation Investment	46
Compliance plan Australian Forestry Management 2004 Plantation Investment	49
Constitution Australian Forestry Management 2004 Land Trust	50
Compliance plan Australian Forestry Management 2004 Land Trust	52
Fees	53
Finance	54
<b>Ruling</b>	<b>59</b>
Application of this Ruling	59
Minimum subscription	60
The Simplified Tax System ('STS')	61
<i>Division 328</i>	61
Qualification	62

Assessable income	63
<i>Section 6-5 and section 328-105</i>	63
Deductions for Initial Establishment Services and Interest	66
<i>Section 8-1 and section 328-105</i>	66
Division 35 - Deferral of losses from non-commercial business activities	68
<i>Section 35-55 – Commissioner’s discretion</i>	68
Section 82KL and Part IVA	72
<b>Explanation</b>	<b>73</b>
Is the Grower carrying on a business?	73
The Simplified Tax System	87
<i>Division 328</i>	87
Deductibility of management fees and lease fees	89
<i>Section 8-1</i>	89
Prepayment provisions	91
<i>Sections 82KZL – 82KZMG</i>	91
<i>Sections 82KZME - 82KZMF</i>	93
<i>Section 82KZMG</i>	99
<i>Application of the prepayment provisions to this Project</i>	104
Interest deductibility	110
<i>Section 8-1</i>	110
<i>(i) Growers who use Arrow Funding or the Major Australian Bank as the finance provider</i>	110
<i>(ii) Growers who DO NOT use Arrow Funding or the Major Australian Bank as the finance provider</i>	115
Division 35 – deferral of losses from non-commercial business activities	117
Section 82KL recouped expenditure	129
Part IVA – general tax avoidance provisions	130
<b>Example</b>	<b>133</b>
Entitlement to GST input tax credits	133
<b>Detailed Contents List</b>	<b>134</b>

**Commissioner of Taxation**

17 March 2004

*Previous draft:*

Not previously released in draft form

*Related Rulings/Determinations:*PR 1999/95; TR 92/1; TR 97/16;  
TR 92/20; TD 93/34; TR 98/22;  
TR 2000/8; TR 97/11*Other references*

TR 2001/14; TD 2003/12

*Subject references:*

- advance deductions and expenses for certain forestry expenditure
- carrying on a business
- commencement of business
- fee expenses
- forestry agreement
- interest expenses
- management fees
- non commercial losses
- producing assessable income
- product rulings
- public rulings
- seasonally dependent agronomic activity
- taxation administration
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project

*Legislative references:*

- ITAA 1936 82KL
- ITAA 1936 82KZL
- ITAA 1936 82KZL(1)
- ITAA 1936 82KZME
- ITAA 1936 82KZME(1)
- ITAA 1936 82KZME(2)
- ITAA 1936 82KZME(3)
- ITAA 1936 82KZME(4)
- ITAA 1936 82KZME(7)
- ITAA 1936 82KZMF

- ITAA 1936 82KZMF(1)
- ITAA 1936 82KZMG
- ITAA 1936 82KZMG(1)
- ITAA 1936 82KZMG(2)
- ITAA 1936 82KZMG(3)
- ITAA 1936 82KZMG(4)
- ITAA 1936 82KZMG(5)
- ITAA 1936 Pt IVA
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 177D(b)
- ITAA 1997 6-5
- ITAA 1997 8-1
- ITAA 1997 17-5
- ITAA 1997 Div 27
- ITAA 1997 Div 35
- ITAA 1997 35-10
- ITAA 1997 35-10(2)
- ITAA 1997 35-10(3)
- ITAA 1997 35-10(4)
- ITAA 1997 35-30
- ITAA 1997 35-35
- ITAA 1997 35-40
- ITAA 1997 35-45
- ITAA 1997 35-55
- ITAA 1997 35-55(1)
- ITAA 1997 35-55(1)(a)
- ITAA 1997 35-55(1)(b)
- ITAA 1997 Div 328
- ITAA 1997 328-105
- ITAA 1997 328-105(1)(a)
- ITAA 1997 Subdiv 328-F
- ITAA 1997 Subdiv 328-G
- TAA 1953 Pt IVA
- Copyright Act 1968
- Corporations Act 2001
- Corporations Act 2001 5C
- Conveyancing Act 1919 (NSW) 87A

*Case references:*

- Commissioner of Taxation v Lau (1984) 6 FCR 202; 84 ATC 4929; (1984) 16 ATR 55

## ATO references

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